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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 589

NORTHERN ILLINOIS COAL CORPORATION,
Petitioner,

vs.

MIDWEST-RADIANT CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

DAVID F. ROOT,
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INDEX.

	PAGE
Petition	1
Jurisdiction	2
Opinion Below	2
Summary Statement of the Matter Involved	2
Questions Presented	5
Reasons for Granting the Writ	5
Prayer	7
Brief	9
Statement of the Case	9
Jurisdiction	9
Opinion Below	10
Specification of Errors	10
Argument	11
Conclusion	23

CITATIONS.

Cases.

Barber v. Pittsburgh Etc. Railway, 166 U. S. 83, 97, 99.	19
Big Creek Coal Co. v. Tanner, 303 Ill. 297	16
Chicago v. Fieldcrest Dairies, 316 U. S. 168, 172, 173	22
Conover v. Parker, 226 Ill. App. 102	16
Duffield v. Duffield, 293 Ill. 300, 303	17
Erie Railroad Company v. Tompkins, 304 U. S. 64, 78	6, 19, 20
Guffey v. Smith, 237 U. S. 101, 113	19
Harder v. Matthews, 309 Ill. 548, 570	17
Jilek v. Chicago, Wilmington & Franklin Coal Co., 382 Ill. 241	15

Kozlowski v. Mussay, 395 Ill. 81, 85, 86..... 17
Manning v. Frazier, 96 Ill. 279, 284, 286.....6, 11, 15, 16
McConnell v. Pierce, 210 Ill. 627..... 16
Olcott v. Bynum, 84 U. S. 44..... 19
Perry Coal Co. v. Richmond, 287 Ill. App. 298..... 16
Plummer v. Worthington, 321 Ill. 450, 452, 455.....5, 12
Powell v. Powell, 335 Ill. 533, 538..... 17
Railroad Commission of Texas v. Pullman Company, 312 U. S. 496, 500..... 22
Rockford Trust Co. v. Moon, 370 Ill. 250, 253..... 17
Sanitary District v. Chicago Title & Trust Company, 278 Ill. 529, 532, 533, 537.....5, 13
Shell Oil Co., Inc. v. Moore. 382 Ill. 556..... 16
Sherman v. Town of Jefferson, 274 Ill. 294, 296.....5, 12
Snydam v. Williamson, 65 U. S. 427..... 19
Storke v. Penn. Mutual Life Insurance Company, 390 Ill. 619.....5, 14
Thompson v. Magnolia Petroleum Company, 309 U. S. 478, 483, 484.....6, 22
Tyler v. United States, 281 U. S. 497, 501..... 20
Uphoff v. Trustees of Tufts College, 351 Ill. 146..... 15
Woods v. Seymour, 350 Ill. 493, 497, 498..... 17

Statutes and Miscellaneous.

Section 1254, Title 28, United States Code..... 2
Section 274d(1), Judicial Code, 28 USCA Section 400(1)..... 2
54 Harvard Law Review 1379..... 23

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PETITION FOR A WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Northern Illinois Coal Corporation, respectfully prays that a writ of certiorari may issue to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment of that court reversing a judgment of the district court finding that petitioner was the owner of coal and salt underlying certain real estate in St. Clair County, Illinois.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

The judgment of the circuit court of appeals was entered on November 30, 1948 (T. 383).

OPINION BELOW.

The opinion of the circuit court of appeals appears in the transcript of the record at page 374. It has not yet been reported. The district court opinion appears in the transcript of the record at page 306. It has not been reported.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This suit involves the question of title to minerals underlying land in St. Clair County, Illinois. Respondent brought the suit under the Declaratory Judgment Act (Sec. 274d(1) of the Judicial Code, 28 U. S. C. A. Sec. 400(1)) invoking federal jurisdiction under the diversity statute.

The facts are quite simple: In 1902 one Augusta Keim owned the land in controversy. In that year she executed and delivered to one D. D. Thomas the deed found at page 153 of the transcript, by which she conveyed upon the terms and conditions therein contained the coal and salt underlying said land. In 1944 D. D. Thomas conveyed his right, title and interest in and to said coal and salt to petitioner (T. 155). In 1909 Augusta Keim executed and

delivered to one Ernest W. Hentze a deed purporting to convey to him the entire fee in said land (the coal and salt not being excepted) (T. 133). In 1944 Hentze's son and successor in title entered into a lease agreement with respondent for the mining and removal of said coal (T. 146).

The deed from Augusta Keim to D. D. Thomas contained the following provision:

> "Grantee to commence sinking a mine at Lenzburg in six months from this date and have same in operation in one year from that date or this deed is to be void."

At the trial it was established by stipulation (T. 301) and plaintiff's exhibit No. 10 (T. 160) that D. D. Thomas in 1902 sunk a coal shaft at Lenzburg but no coal was found and consequently none produced, and that D. D. Thomas expended approximately $3,000.00 of his own funds in the sinking of said shaft; insofar as the matter in dispute between petitioner and respondent is concerned, *no other evidence was offered or admitted at the trial.*

The only question in the case between petitioner and respondent concerns the legal effect of the deed from Augusta Keim to D. D. Thomas.

The district court in its written opinion (T. 306) construed the Keim-Thomas deed to be a conveyance of the coal and salt upon condition subsequent (T. 309), and held that although there had been a breach of the conditions stated, a re-entry by Augusta Keim or her heirs was necessary to revest title to the coal and salt in her or her heirs (T. 310), that there had been no re-entry, and that therefore title in and to the coal and salt remained vested in petitioner as Thomas' grantee (T. 311).

The circuit court of appeals in reversing the district court construed the Keim-Thomas instrument to be a conveyance of an estate upon a condition precedent and held

that Thomas' estate was terminated by abandonment, and therefore petitioner, as Thomas' grantee, had no right, title or interest in and to said coal and salt (T. 381).

This case involves only the title to Illinois real estate. No constitutional or other federal question is involved. Were it not for the accident of federal jurisdiction, based solely upon diversity, the case would have been determined by the courts of Illinois. By its decision that the conveyance from Keim to Thomas created an estate upon condition precedent, the circuit court of appeals has completely ignored decisions of the Supreme Court of Illinois directly on point. This decision, if permitted to stand, has created in Illinois a separate rule for the construction of deeds creating conditional estates in land. By abrogating the Illinois rule in the federal courts the circuit court of appeals has established a rule of construction which in the future will result in the adjustment of rights solely upon the happy or unhappy chance of adjudication before a federal or a state court. Consequently, in the future an owner of a conditional estate in Illinois realty, by not knowing who his adversary might ultimately be, and whether or not his rights will be adjudged in a federal or a state court, will not know his rights in relation to such land.

The circuit court of appeals found that "the precise question * * * has never been passed upon by the Illinois courts" (T. 378). We disagree. However, if this were true, the court should have remitted the question to the district court for submission to the state courts of Illinois for decision, for they plainly constitute the more appropriate forum, and upon subsequent decision by the Supreme Court of Illinois it may appear that the rights in local property of the parties to this proceeding have, by the accident of federal jurisdiction, been determined contrary to the law of Illinois which in this matter is supreme.

QUESTIONS PRESENTED.

1. Does an instrument in the form and language of the deed from Augusta Keim to D. D. Thomas, under the law of Illinois, create in the grantee an estate upon condition subsequent or an estate upon condition precedent?

2. In the event that the legal effect of an instrument affecting title to real estate has not been passed upon by the courts of the particular state, should a federal court, when no constitutional or other federal question is involved and its jurisdiction rests solely upon diversity, undertake to decide an important question of local law, or should the parties be remitted to the state courts as the more appropriate forum?

REASONS FOR GRANTING THE WRIT.

The discretionary power of this Court to grant a writ of certiorari is invoked upon the following grounds:

1. The decision of the circuit court of appeals that the Keim-Thomas instrument created an estate upon condition precedent is in direct conflict with the decisions of the Supreme Court of Illinois in *Plummer* v. *Worthington*, 321 Ill. 450; *Sherman* v. *Town of Jefferson*, 274 Ill. 294; *Sanitary District* v. *Chicago Title and Trust Company*, 278 Ill. 529, and *Storke* v. *Penn. Mutual Life Insurance Company*, 390 Ill. 619.

2. The decision of the circuit court of appeals was based upon the court's supposition as to the intention of the parties to the Keim-Thomas instrument and their practical construction thereof. In arriving at this decision the court

departed so far from the accepted course of judicial proceedings as to call for the exercise of this Court's power of supervision.

a. This decision is based upon conclusions of the court which were arrived at solely by wild assumption, imagination, speculation and conjecture, *wholly unsupported by any evidence offered or appearing in the record.*

b. This decision completely ignores and is in direct conflict with the decision of the Supreme Court of Illinois in *Manning* v. *Frazier*, 96 Ill. 279.

3. The circuit court of appeals has enunciated important rules of local real estate law directly opposed to the rules established by the courts of Illinois, the direct result of which will be that property rights will vary according to whether enforcement is sought in the state or federal courts. Thus the non-citizen has the privilege of selecting the court in which the right should be determined, thereby rendering impossible equal protection of the law and uniformity in its administration in the State of Illinois. Consequently, this decision creates in Illinois a situation condemned by this Court in *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, and later cases.

4. The circuit court of appeals was faced with the interpretation of an instrument of conveyance in accordance with Illinois law. If the court was correct in its statement that "the precise question has never been passed upon by the Illinois courts," the parties should have been remitted to the district court for submission of the question to the courts of Illinois as the more appropriate forum for decision in accordance with the decision of this Court in *Thompson* v. *Magnolia Petroleum Company*, 309 U. S. 478, especially in view of the fact that no constitutional or other federal question was involved and federal jurisdiction was invoked only through diversity.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

DAVID F. ROOT,
LEONARD HOFFMAN,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. .....

NORTHERN ILLINOIS COAL CORPORATION,
Petitioner,

vs.

MIDWEST-RADIANT CORPORATION,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The essential facts of the case are stated in the accompanying petition for a writ of certiorari.

JURISDICTION.

The jurisdiction of this Court is shown in the accompanying petition.

OPINION BELOW.

The opinion of the circuit court of appeals is found at page 374 of the transcript.

SPECIFICATION OF ERRORS.

If a writ of certiorari is issued, petitioners intend to urge that the Circuit Court of Appeals for the Seventh Circuit erred:

1. In deciding that the instrument from Augusta Keim to D. D. Thomas created an estate on condition precedent and that that estate was terminated by abandonment.

2. In failing to remit the parties to the district court for submission of the question to the courts of Illinois as the more appropriate forum for decision after finding that the precise question had never been passed upon by the Illinois courts.

ARGUMENT.

I.

The Circuit Court of Appeals Has Decided an Important Question of Local Law In Direct Conflict With the Decisions of the Supreme Court of Illinois.

The heart of the controversy in the present case is the construction of the conveyance from Augusta Keim to D. D. Thomas. This deed is a typical mining conveyance under the Illinois law (*Manning* v. *Frazier*, 96 Ill. 279). It contains a clause for the protection of the grantor in case the grantee does not commence mining operations. Such a protective clause is habitually inserted in mineral conveyances in Illinois. The clause in the Keim-Thomas deed reads as follows:

> "Grantee to commence sinking a mine at Lenzburg in six months from this date and have same in operation in one year from that date or this deed is to be *void*." (Italics supplied.)

This type of protective clause has been consistently held by the Illinois courts to create an estate upon condition subsequent, as found by the district court, and it operates to protect the grantor, upon grantee's failure to comply with the conditions stated, by giving the grantor the right to re-enter the estate conveyed and thereby revest title thereto in himself. In this case Augusta Keim could have done just that, had she so chosen. Her failure to re-enter was a matter of record at the time respondent entered into its lease agreement with Hentze, and was specified as a defect in Hentze's title by respondent's attorneys as follows (T. 17):

> "This is to advise that, under the terms of Lease Agreement entered into between you and Midwest-Radiant Corporation, dated October 5, 1944, Midwest-Radiant Corporation has examined title to the real estate described in said Lease Agreement and has found that your title in and to said real estate is defective in the following respects:
>
> (1) There appears on record a *deed* to D. D. Thomas in and to the coal and salt lying under the surface of the premises described, dated March 20, 1902, and recorded April 17, 1902, in Book 294, at page 153." (Italics supplied.)

The decision of the circuit court of appeals is in direct conflict with the decision of the Supreme Court of Illinois in *Sherman* v. *Town of Jefferson*, 274 Ill. 294. The deed construed in that case contained the following protective clause:

> "This conveyance is made, * * * and upon ceasing to be so used and enjoyed by the said party of the second part, in whole or any part thereof, the conveyance above becomes and remains *absolutely void* and of no longer force, effect or obligation as against the said party of the first part, his heirs and assigns." (Italics supplied.)

The Supreme Court of Illinois stated (p. 296):

> "It is undeniable that the conveyance from John Gray to the town of Jefferson 'for town purposes only', and upon ceasing to be so used the conveyance to become *void* as against the grantor and his heirs, *was a valid condition subsequent.*" (Italics supplied.)

The decision of the circuit court is also in direct conflict with the decision of the Supreme Court of Illinois in *Plummer* v. *Worthington*, 321 Ill. 450. Following the description in the deed in that case appeared the following protective clause (p. 452):

> "Provided, nevertheless, that the said party of the second part shall pay, or cause to be paid, to the parties

of the first part the sum of $40 per annum during their natural lives. Now, if the above sum of $40 is not paid annually by the party of the second part, then everything herein contained shall be *null and void.*" (Italics supplied.)

The Supreme Court of Illinois stated (p. 455):

> "*The condition for the annual payment of $40 in each deed was clearly a condition subsequent.* Whether or not it was also a covenant it is unnecessary to determine. The stipulation that upon failure to make an annual payment everything contained in the deed should be *null and void was equivalent to an express stipulation for the forfeiture of the estate and a right of re-entry by the grantor.*" (Italics supplied.)

The decision of the circuit court is also in direct conflict with the Supreme Court of Illinois in *Sanitary District* v. *Chicago Title and Trust Company,* 278 Ill. 529. The deed construed in that case contained a protective clause as follows (p. 532):

> "That the district shall construct, excavate and complete said proposed new channel of the dimensions specified in section 2 and shall cause the waters of the Chicago river to permanently pass through the same within three years from the date of the deed, and shall construct said channel of the dimensions mentioned in section 2 through the above property within two years from and after the date of the deed."

Other conditions were also stated and then the deed contained this paragraph (p. 533):

> "This deed is made on the express condition that the party of the second part, or its successors, shall faithfully perform each and all of the conditions herein contained on its part to be performed, and any neglect or failure so to do shall forfeit the estate hereby conveyed, and in such case *this conveyance shall be null and void* and the estate hereby conveyed shall revert to and immediately vest in the party of the first part, its successors and assigns." (Italics supplied.)

The Supreme Court of Illinois stated (p. 537):

> "That instrument is a deed poll conveying the land described solely for the purpose of the proposed new channel *upon conditions subsequent.* The effect of it was to vest the title in the appellant until condition broken, as completely as if the conveyance had been absolute. *The appellee retained no estate in the land and had no more than a possibility of reverter,*—the bare right of entry in case of the breach of a condition." (Italics supplied.)

The only word of condition in the Keim-Thomas deed is the word *"void"*. The above three cases are clear and irrefutable decisions of the Supreme Court of Illinois on the legal effect of the use of that word in Illinois deeds. When the word *"void"* is used as a word of limitation in Illinois conveyances of conditional estates it cannot effect the creation of anything but an estate upon condition subsequent.

A full discussion of the law of Illinois with reference to the distinction between estates upon condition subsequent and estates upon condition precedent is set forth in the recent case of *Storke* v. *Penn. Mutual Life Ins. Co.*, 390 Ill. 619, decided by the Supreme Court of Illinois in 1945.

In its opinion the circuit court repeatedly refers to the protective clause in the Keim-Thomas deed as the "abandonment clause", assumes that the clause was inserted for the benefit of Thomas, ignores the Illinois law, and on the basis of cases from other jurisdictions concludes that the Keim-Thomas deed created an estate upon condition precedent. The denomination by the circuit court of this clause as an "abandonment clause" is an interjection into the real property law of Illinois of a most absurd fiction. The clause is not a clause of abandonment for the benefit of the grantee, but rather a protective clause for the benefit of the grantor. Though the Supreme Court of Illi-

nois has repeatedly construed clauses in deeds similar to the one here under consideration, it has *never* indicated that such a clause was an "abandonment clause". On the contrary it has been consistently held by the Illinois courts that a fee, once created, cannot be abandoned (*Uphoff* v. *Trustees of Tufts College*, 351 Ill. 146 and *Jilek* v. *Chicago, Wilmington and Franklin Coal Co.*, 382 Ill. 241). *In Illinois there is no such thing as an "abandonment clause" in the law of deeds. In Illinois a fee, once created, cannot be abandoned.*

The decision of the circuit court is in direct conflict with the decision of the Supreme Court of Illinois in *Manning* v. *Frazier*, 96 Ill. 279, wherein the Supreme Court of Illinois construed an instrument so similar in form, wording and nature to the Keim-Thomas instrument that it must be considered as a controlling precedent in this case. The circuit court said (T. 382):

> "The deed [in *Manning* v. *Frazier*] did not contain any provision comparable to the abandonment clause in the Keim-Thomas instrument, nor did the court decide any question as to the character of the estate conveyed."

Although the deed construed in *Manning* v. *Frazier*, 96 Ill. 279, was not set forth *verbatim* in the opinion, the Supreme Court of Illinois said, at page 284, that it contained a provision that:

> "the parties of the second part were bound to enter upon and make search for coal, etc., within two years * * *."

This was the protective clause of that deed. It is obvious that the deed in *Manning* v. *Frazier*, 96 Ill. 279, *did* contain a provision "comparable to the abandonment clause in the Keim-Thomas instrument", and did require the grantee to commence operations within a specified time.

And the circuit court of appeals is in error in stating that the Supreme Court of Illinois in *Manning* v. *Frazier,* 96 Ill. 279, did not "decide any question as to the character of the estate conveyed," for the Supreme Court of Illinois said, in its opinion at page 286:

> "* * * the title to the coal undoubtedly vested in the grantee in the deed."

The Supreme Court of Illinois in *McConnell* v. *Pierce,* 210 Ill. 627; *Shell Oil Co., Inc.* v. *Moore,* 382 Ill. 556; *Big Creek Coal Co.* v. *Tanner,* 303 Ill. 297 and the appellate courts of Illinois in *Perry Coal Co.* v. *Richmond,* 287 Ill. App. 298 and *Conover* v. *Parker,* 226 Ill. App. 102, all cite *Manning* v. *Frazier,* 96 Ill. 279, as having construed the instrument involved therein to be a deed of conveyance of the minerals described.

It is important to note that the deed construed in the case of *Manning* v. *Frazier,* 96 Ill. 279, provided for the payment of royalty on each ton of coal mined, and that the Illinois Supreme Court said, page 286:

> "The fair and reasonable construction of the instrument, we think, is that it was a sale and conveyance of the coal in the mine on credit, * * *."

Thus there can be no suggestion that the similar provision for the payment of royalty in the Keim-Thomas deed affected the estate conveyed.

The Circuit Court of Appeals in its opinion completely ignored the decisions of the Illinois Supreme Court which we have herein cited, and arbitrarily based its decision on assumed facts and cases from other jurisdictions. This, we respectfully urge, constitutes a proper occasion for the exercise of the supervisory power of this court.

II.

In Reaching Its Decision the Circuit Court of Appeals Departed So Far from the Accepted Course of Judicial Proceedings as to Call for This Court's Power of Supervision.

The only facts established in this case, apart from the Keim-Thomas deed itself, are those appearing in the Court's opinion at pages 375 and 376 of the Transcript. Absolutely no evidence relating to the intention of Keim or Thomas at the time of the execution of the deed or as to their construction of its effect was offered at the trial. The record on these matters is utterly barren. Moreover, even if such evidence had been offered it would not have been admissable to change the legal effect of the deed. It is a settled rule of law in Illinois that "* * * the nature and extent of the estate granted shall be determined, as a matter of law, from the deed itself. It is not proper to go beyond the four corners of the deed to ascertain the intention of the parties. *Parol evidence may be received to apply the deed to the subject matter, but not to change its legal effect.*" (Italics supplied.) *Rockford Trust Co.* v. *Moon*, 370 Ill. 250, 253; *Powell* v. *Powell*, 335 Ill. 533, 538; *Woods* v. *Seymour*, 350 Ill. 493, 497, 498; *Kozlowski* v. *Mussay*, 395 Ill. 81, 85, 86; *Harder* v. *Matthews*, 309 Ill. 548, 570; *Duffield* v. *Duffield*, 293 Ill. 300, 303.

Despite this rule of construction, despite the rules laid down by the Illinois Supreme Court regarding the legal effect of this instrument and of the last clause thereof, and despite the absolute barrenness of the record, the Circuit Court said (T. 380, 381):

> "It is clear from this *record* that insofar as Thomas' relation with Mrs. Keim was concerned, Thomas construed the instrument as a mere prospective arrangement whereby he had the right to absolve himself from all obligations to her by electing not to go ahead with

placing a mine in operation at Lenzburg before March 20, 1903; that as a result of his election the instrument was rendered void and consequently he was released from all obligations thereunder. Mrs. Keim and her successors in title acquiesced in this construction and not only acted thereon, but changed their position in reliance upon Thomas' interpretation of the instrument as one which he could nullify under the abandonment clause, and both of them treated the instrument as having become void upon Thomas' abandoning in 1903 the shaft he had sunk on the Prediger land. Mrs. Keim never asserted against Thomas any right predicated upon the instrument, and Thomas went his way for over forty years as if the instrument had never been executed * * *.

"In our opinion, when we place ourselves in the place of the parties and read the instrument in the light of the circumstances concerning the parties at the time the instrument was executed, consider the objects they sought to attain and weigh the practical construction which they themselves placed on the instrument * * *." (Italics supplied.)

The Court has here formulated a decision only upon the sheerest imagination, conjecture and supposition. The Court has so arbitrarily ignored the record and the law of Illinois in this case, as to call for the exercise of this Court's supervisory power. Such a process of decision as employed here is not merely of concern to the litigants, but is an exhibition of a ruthless method of decision which if permitted to stand will undoubtedly be repeated in the future, and is thus of utmost importance to future litigants in the Seventh Circuit.

III.

The Refusal of the Circuit Court of Appeals to Follow Illinois Law Is In Direct Conflict With Decisions of This Court and Creates In Illinois a Situation Condemned by This Court.

By completely ignoring the Illinois decisions directly on point and holding that the Keim-Thomas deed created an estate upon condition precedent, the decision of the Circuit Court of Appeals is in direct conflict with the decisions of this Court.

This Court in the case of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, said, at page 78:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law."

From the earliest times the United States Supreme Court and the other federal courts have consistently held that decisions of state courts which settle rules of property will be applied in and be respected by the federal courts. *Olcott* v. *Bynum*, 84 U. S. 44; *Snydam* v. *Williamson*, 65 U. S. 427.

This Court in the case of *Guffey* v. *Smith*, 237 U. S. 101, applied Illinois law to construe rights passing under an oil and gas lease, and said, at page 113:

> "These decisions constitute rules of property and must be accepted and applied in passing upon the complainants' rights."

This Court in *Barber* v. *Pittsburgh, etc. Railway*, 166 U. S. 83, in deciding the question arising upon the filing of an action of ejectment said, at page 97:

> "The real question between the parties, upon which the decision of this case must turn, is what estate Amanda Stephens took under the will of James S. Stevenson * * *."

This Court then went on to say, at page 99:

> "When the construction of certain words in deeds or wills of real estate has become a settled rule of property in a State, that construction is to be followed by the Courts of the United States in determining the title to land within the State, whether between the same or between other parties."

This Court in *Tyler* v. *United States*, 281 U. S. 497, had before it a tax case which involved the character and incidents of tenancy by an entirety, and said, at Page 501:

> "These decisions establish a state rule of property, by which, of course, this Court is bound."

If the Circuit Court's decision is allowed to stand, it is incontrovertible that a rule for the construction of deeds creating conditional estates in Illinois will exist in the federal courts separate and apart from the Illinois law. Thus, the exact situation denounced by this Court with regard to the application of general law in *Erie Railroad* v. *Tompkins*, 304 U. S. 64, will have been created with respect to an important phase of local law. Future rights will be adjusted on the happy or unhappy chance of adjudication before one court or another. Any person purchasing land, by not knowing who his adversary might ultimately be, will not know his rights in relation to such land. Equal protection of the law will be impossible and uniformity in the administration of the law of the State of Illinois will be prevented.

The trial court, in taking cognizance of the Illinois authority submitted, said (T. 313):

> "It is not to be presumed that the courts in Illinois, whatever may be the law in other jurisdictions, would

apply in this case an innovation that would destroy or endanger another long-established rule of property."

Countless titles in Illinois are based upon protective clauses similar to that in the Keim-Thomas deed. The question thus presented is of vital importance to property owners in Illinois and we urge that a proper occasion has arisen for the exercise of the supervisory power of this Court.

IV.

The Decision of the Circuit Court of Appeals to Remand the Case for Further Proceedings In Conformity With Its Opinion Is In Direct Conflict With the Decisions of This Court.

The Circuit Court was faced with the interpretation of an instrument of conveyance under Illinois law. No constitutional or other federal question was involved. Petitioner and respondent were in the federal court solely by virtue of diversity. Respondent filed this case in the federal court sitting in East St. Louis, Illinois, which is in the county where the land involved is located. The availability of the state tribunal is obvious. For a reason known only to respondent it chose the federal court. *Although it does not appear in the record, a case involving substantially identical issues, and affecting title to the land here in question, to which both petitioner and respondent have been made parties, and in which respondent has appeared, is now pending in the state court.*

In its opinion the Circuit Court stated (T. 378):

> "the precise question * * * has never been passed upon by the Illinois courts."

It then proceeded to decide an important question of local real estate law. By doing so it failed to concern itself

"with the much larger issue as to the appropriate relationship between federal and state authorities functioning as a harmonious whole" (*Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168, 172, 173). It made a forecast and prediction as to what the Illinois courts would ultimately hold, realizing that by making a tentative answer in a field in which the state is supreme its decision might "be displaced tomorrow by a state adjudication" (*Railroad Commission of Texas* v. *Pullman Company*, 312 U. S. 496, 500).

The Circuit Court's decision on the issue of title, after finding that no state decision had been found, is in direct conflict with the decision of this Court in *Thompson* v. *Magnolia Petroleum*, 309 U. S. 478. In that case this Court said (p. 483, 484):

> "Decision with which the Federal court of bankruptcy is here faced calls for interpretation of instruments of conveyance in accordance with Illinois law. Neither statutes nor decisions of Illinois have been pointed to which are clearly applicable. And the difficulties of determining just what should be the decision under the law of that State are persuasively indicated by the different results reached by the two Circuit Courts of Appeal that have attempted the determination. Unless the matter is referred to the State courts, upon subsequent decision by the Supreme Court of Illinois it may appear that rights in local property of parties to this proceeding have—by the accident of Federal jurisdiction—been determined contrary to the law of the State which in such matters is supreme."

Moreover, the Circuit Court's decision is in direct conflict with the decisions of this Court in *Railroad Commission of Texas* v. *Pullman Company*, 312 U. S. 496, and *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168, in which cases this Court, recognizing the desirability of having state determinations upon doubtful questions of state law, ordered that the question be remitted for submission to the

state courts as the more appropriate forum for decision. (See 54 Harvard Law Review 1379.)

Conclusion.

The decision of the Circuit Court of Appeals for the Seventh Circuit is manifestly erroneous. The question presented is of paramount importance in Illinois real estate law. The decision is in direct conflict with the decisions of the Supreme Court of Illinois. A settled rule of construction upon which countless titles are based has been set aside in the federal court and an arbitrary and conflicting rule established. A situation condemned by this Court respecting the application of local law has been created. It is, therefore, respectfully urged that this petition for writ of certiorari be granted.

Respectfully submitted,

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